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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

JAMES H. SEWELL, DOING BUSINESS AS BURNS CUBOID COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above cause on December 12, 1956.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 11–29) is not yet reported. The findings and order of the Federal Trade Commission are printed as Appendix C, *infra*, pp. 32–44.[1]

[1] The record was not printed in the court below. The Commission's decision appears in the typed transcript certified to the Court at volume I, pp. 170–186. We shall refer to the transcript by using a Roman numeral (to indicate the volume) followed by an Arabic numeral (to indicate the page), *e. g.*, I, 170–186.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1956 (Appendix B, *infra*, pp. 30–31). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Court of Appeals, in reviewing an order of the Federal Trade Commission directed against false representations, held that the testimony of certain "satisfied" customers overcame the contrary testimony of expert witnesses, and that the Commission's findings as to the falsity of the representations therefore lacked evidentiary support.

The question presented is whether the court, in so holding, substituted its judgment upon the facts for that of the Commission, and exercised fact-finding functions which the statute reserved to the Commission.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease

and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * *. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

For a number of years, respondent has been making and selling a device made of cork, felt, and leather which is sold in pairs for insertion in shoes. The device is designated "Cuboids", "Burns Cuboids", or "Cuboid Foot Balancers". It has side elevations designed to begin at the forward sides of the wearer's heel and to end across the area of the ball of the foot behind the metatarsal joints. (App. C, *infra,* p. 33.)

In advertising the device, respondent has made various claims as to what it will accomplish. Among the claims thus made are: "Now everyone can enjoy better posture, poise and balance * * * with Cuboids"; "Cuboids help to distribute body weight", "help improve your stance", and "provide the basis for correct posture"; they help you enjoy "more normal foot action" and "increased foot health and comfort", "make housework less tiring", and afford "relief from aches and pains"; and "[w]ith Cuboids foot pains

often disappear as if by magic" (App. C, *infra,* pp. 34–35).[2]

The complaint, which the Commission issued in 1951, charged that these representations were false and misleading and that respondent thereby engaged in unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (I, 4–8).

At the hearing, four experienced orthopedic specialists or surgeons of recognized standing testified as to the falsity of the sweeping and unqualified claims made on behalf of respondent's device.[3] Six witnesses called by respondent testified that they had used his

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[2] The Commission found that the instances in which Cuboids would beneficially relieve pressure on the foot would be rare or occasional "happenstances", and that use of the device, on the other hand, "might aggravate the condition for which it was being used to correct" (App. C, *infra,* p. 39).

[3] The following summarizes the qualifications of the Commission's witnesses:

Dr. Engh, orthopedic specialist for 15 years, is chief of staff of the Anderson Orthopedic Clinic and chief orthopedist of several hospitals in the Washington, D. C., area; chief consultant in orthopedics for the United States Public Health Service in the Washington, D. C., area; faculty member of George Washington University Medical School for 10 years; member of the American Medical Association, American Academy of Orthopedic Surgeons; president of the Virginia Orthopedic Society; and diplomat of the American Board of Orthopedic Surgery. He sees approximately 100 foot cases each week and has seen a couple of hundred patients who wore petitioner's device. (II, 11–18, 37.)

Dr. Masterson, an orthopedic specialist, spent three years at that specialty in the Army and has since been engaged in private practice, which has included three years' orthopedic work at the Anderson Orthopedic Clinic. He is connected with various hospitals in the Washington, D. C., area, and has seen over 100 patients wearing petitioner's device. (II, 63–67.)

device and found it helpful. One of the six was a doctor employed by respondent to testify as an expert (III, 487, 572–5; IV, 794), one was a consultant employed by *Good Housekeeping Magazine* to determine whether the device met the magazine's standards for acceptance of advertising (II, 156, 180, 186–7), and the other four were all residents of Santa Ana, California (III, 505–507, 593–4; IV, 629–30, 640–1), where respondent lives and manufactures his device (II, 266–8).

The Commission found that various claims made by respondent to induce purchases of his device were false (App. C, *infra,* pp. 40, 42), and it entered an order prohibiting these representations (*id., infra,* pp. 42–44).

On review of the order, the Court of Appeals, in an opinion by Judge Chambers, ruled that only subparagraph (g) should be affirmed (App. A, *infra,* p. 15).[4]

Dr. Mosiman, orthopedic surgeon, served an orthopedic internship at Johns Hopkins Hospital, was chief of section of an orthopedic hospital in the Army, and taught orthopedic surgery at Tulane University for two years. (II, 104–107.)

Dr. Lewin, an active orthopedic surgeon since 1915, has done extensive post-graduate work in orthopedics in this country and abroad. He is chairman of the Department of Bone and Joint Surgery at Northwestern Medical School in Chicago, and Professor of Orthopedic Surgery at the Post Graduate Medical School of Cook County. He is a diplomat on the American Board of Orthopedic Surgery; a fellow in the American College of Surgeons, the International College of Surgeons, and the American Medical Association; and a member of the Clinical Orthopedic Society, the American Academy of Orthopedic Surgery, and the American Orthopedic Society. He is the author of numerous publications and books in the field of orthopedics. (IV, 818–827.)

[4] See also the decree which the court entered (App. B, *infra,* pp. 30–31).

The court, without referring to the statutory provision that the Commission's "findings * * * as to the facts, if supported by evidence, shall be conclusive" (*supra,* p. 3), concluded that the evidence shows that users of the device "very, very frequently" find it helpful, and that the doctors' opinion evidence and their few case histories did not "overcome the proof of frequent successful use" (*id., infra,* p. 16). The court declared that "in the main, we do not think the expert opinion meets the proof here of the generally satisfied customer"; that the Commission's experts apparently would proscribe those who suffer from foot aches and pains from experimenting with devices to give relief; and that respondent's claims, with one exception, "are within the legitimate field of 'puffing'" (*id., infra,* p. 17). The court therefore deemed the Commission's findings to be "left without substantial evidence" (*id., infra,* p. 18).

In a concurring opinion, Judge Fee stated that the question whether respondent's device advantageously affects balance, poise, posture, and comfort is "not one for expert opinion," and that "[t]he lay testimony alone was substantial on this issue" (App. A., *infra,* p. 21). In his view the claim that with Cuboids "everyone can enjoy better posture, poise, and balance," while "patently false," was not "deceptive" because it was addressed to the "taste and subjective feelings" of potential users (*id., infra,* pp. 22–23). Hence, Judge Fee concluded, respondent's advertising was not deceptive "as a matter of law" (*id., infra,* p. 23). A dissenting opinion by Judge Pope expressed sharp disagreement with the views of the majority.

REASONS FOR GRANTING THE WRIT

The dissent below observed, we think correctly, that "the court has assumed a power which it does not have and has meddled in a decision which it is not authorized to make" (App. A, *infra*, p. 24). The dissent also declared (*ibid.*) that the following quotation from *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73 (which reversed a decision by the Court of Appeals for the Ninth Circuit), "could not be more apt if it had been spoken concerning this very case":

> "The findings of the Commission as to facts, if supported by testimony, shall be conclusive." 15 U. S. C. Sec. 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63) forbid that exercise of power.

The court below not only erroneously rejected the findings of the Commission upon the basis of its own independent evaluation of the weight of the evidence, but it also erred, we submit, in various related or subsidiary conclusions. (1) The court rejected Commission findings, and prohibitions of its order based thereon, which the testimony of "satisfied customer[s]"

did not even contradict.[5] (2) It gave unwarranted scope and generality to the very limited showing made with respect to satisfied customers. (3) It failed to recognize that it is deceptive to make unqualified claims of benefit when only a few users will, by happenstance, be benefited.[6]

The court below also gave what it termed the "legitimate field" of "puffing" (App. A, *infra,* p. 17) a latitude plainly inconsistent with the decision of this Court in *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112. In that proceeding under Section 5 of the Federal Trade Commission Act, the Court said (p. 116):

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. * * * Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

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[5] We refer to the findings and prohibitions relating to the claims that respondent's device assists in balancing the feet or body, that it improves posture, poise, and stance, that it beneficially affects distribution of body weight, and that it results in more normal or improved foot action.

[6] This occasional benefit is recognized in subparagraph (e) of the Commission's order, which permits respondent to claim that his device "may in instances reduce or relieve the discomfort associated with tired or strained feet" (*infra*, p. 43).

We submit that the decision below is in plain conflict with applicable decisions of this Court, and that it is also in conflict with numerous decisions in which courts of appeals of other circuits have given effect to the settled principles governing judicial review of orders of the Federal Trade Commission.

However erroneous the decision below, the case might not merit review by this Court if all that was at stake was obtaining enforcement of the particular order involved. Review is being sought because we believe that the approach reflected in this decision may seriously interfere with the future administration of the Federal Trade Commission Act insofar as it relates to foods, drugs, cosmetics, and devices. On the issue of therapeutic value, conflict between such lay testimony and that of qualified medical experts is the rule rather than the exception. The holding below that the former evidence is the more substantial, or that it alone is substantial, constitutes a precedent which is applicable to many Commission proceedings and one which, if it stands, is a serious obstacle to effective enforcement of the Act.

CONCLUSION

We believe that the errors in the decision of the Court of Appeals are manifest from the opinions rendered in that court. It is suggested that this Court may deem it appropriate to grant the writ and reverse, without further briefs or argument. See *Federal Trade Commission* v. *Carter Products, Inc.* 346

U. S. 327; *Federal Trade Commission* v. *American Crayon Co.*, 350 U. S. 907, 352 U. S. 806.

Respectfully submitted,

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MARCH 1957.

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit

Before: Pope, Fee and Chambers, *Circuit Judges.*

Chambers, *Circuit Judge:*

Sewell, petitioner here, and respondent before the Federal Trade Commission, has successfully built in and from Santa Ana, California, a large business in the manufacture and sale of an article which we can call a shoe insert. Its basic name is Cuboids. This is a derivation from the cuboid bone in the arch of the human foot. Various names are used in marketing like "Cuboid balancer" or "Doggies." A ready market for the device is found among the legion of Americans who complain about their feet.

The insert is ordinarily sold in department stores in metropolitan centers where representatives on the payroll of Sewell sell the product, usually for the account of Sewell, rather than the department store. Those who sell it have had some training in fitting shoes and selling corrective devices. Some sales are made by mail order after a customer has filled out a questionnaire which is intended to elicit his complaints. Some sales are made by stores that do not have a Sewell representative on the premises.

The insert is made on a license from an inventor named Burns, who apparently first marketed the device himself on a limited basis. The article moves in commerce among the states. There are about 200 different models of the same basic thing, which is made

with two layers of leather with cork at various points in between the layers of leather. The difference in sizes of shoes accounts for many models. Then for each foot size a variety of thicknesses is manufactured.

The attack initiated by the Federal Trade Commission is on Sewell's advertising. We assume that Sewell would readily admit that his advertising has been a big factor in building his business: that the product has not entirely sold itself.

Some of the lines of Sewell's advertising which were the subject of the Commission's complaint were as follows:

> "Cuboids help to balance your body weight * * *
>
> "CUBOID FOOT BALANCERS
>
> ". . . the foot and body balance, the relief from aches and pains CUBOIDS afford.
>
> "Better poise and balance replace aches and pains.
>
> "Drive away foot fatigue with Cuboids. Enjoy more normal foot action with Cuboids.
>
> "They're the modern way to foot relief—combining scientific principles of balance and support to lessen fatigue and help improve your stance.
>
> "Now everyone can enjoy better posture, poise and balance with . . ., Cuboids.
>
> "Especially designed to help you enjoy increased foot health and comfort.
>
> "With Cuboids foot pains often disappear as if by magic.
>
> "Cuboid foot balancers make housework less tiring.
>
> "Cuboids help to distribute body weight removing pressure from delicate nerve centers and arteries transferring it to better cushioned parts of the feet.

"The feet are the body's foundation. Cuboids balance this foundation and provide the basis for correct posture.

"The Cuboid bone is the keystone of the outer or weight-bearing arch and its position determines the relative position of every other bone in the foot. Cuboid metal-free foot balancers are scientifically designed to help bring these bones into normal position.

"Cuboids afford effective relief to aching and calloused feet."

After peripatetic hearings in various parts of the United States, the examiner filed a report which proscribed not only the foregoing claims, but which recommended that Sewell be forbidden to use advertising matter which he had discontinued four years previously. The Commission followed the examiner on the advertising set forth above shown to be in current use but refused to whip the dead horse of Sewell's discontinued advertising.[1] Now, Sewell seeks review here.

Before the examiner, medical men, orthopaedic specialists, testified for Sewell's claims and against them.

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[1] It is evident that Sewell or his predecessors for several years had not proclaimed:

1. "Cuboids strengthen weak muscles and counteract poor circulation.
2. "Cuboids air circulation.
3. "Cuboids strengthen weak feet.
4. "Cuboids aid circulation—stimulate flow of nervous energy in the feet."

Some of the critical testimony of the experts concerns these specific claims. Had the examiner eliminated these claims at the outset from consideration of his inquiry, the hearings could have been materially shortened.

Tactically the trial of these more or less specific claims easily permitted the Commission's experts to condemn Sewell's devices more stridently and to overlook the real issue of: Do the supports frequently give relief to those who complain of their feet?

Sewell showed that medical doctors, presumably reputable, in great numbers regularly prescribe his device. He had much testimony that people are regularly pleased with the device. He showed that only three per cent of all purchasers take advantage of their "satisfaction guaranteed or your money back" offer.

But be the foregoing as it may, the Commission entered an order forbidding:

> "1. Disseminating or causing to be disseminated by means of the United States mails, or by any means in commerce, as 'commerce' is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:
>
> "(a) That the wearing of respondents' device will assist in balancing the feet or body.
>
> "(b) That respondents' device possesses therapeutic value for aching or painful feet.
>
> "(c) That the wearing of respondents' device will enable the user to achieve better posture or poise or will improve the stance.
>
> "(d) That the wearing of respondents' device will result in more normal foot action or foot health.
>
> "(e) That the wearing of respondents' device will afford increased comfort for the feet or decrease the fatigue resulting from housework or other physical efforts except to the extent that respondents' device may in instances reduce or relieve the discomfort associated with strained or tired feet.
>
> "(f) That the wearing of respondents' device will have beneficial effect upon the distribution of body weight.
>
> "(g) That the wearing of respondents' device will in any way aid the Cuboid Bone or its position or stability with respect to other

bones of the feet or will serve to readjust, realign, normalize or improve the position of the bones of the feet.

"(h) That said device possesses therapeutic value in the treatment of calloused feet.

"2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said product in commerce, as 'commerce' is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in Paragraph 1 hereof."

This court is satisfied that the Commission must be affirmed insofar as advertised claims assert that the device has a special effect on the cuboid bone of the foot or is a "scientific" device. That is a highly technical matter upon which experts testified both ways. There the Commission could take its choice.

On highly technical matters one's product claims, under the law, are at the mercy of experts, even though the group relied upon may ultimately be proved wrong. Yet that is the way the legal system works and must work.

On the other hand, we are not disposed to issue our mandate to cease and desist with respect to the general claims in the advertising on the assertions made with reference to "balance," "balancers," "improved health," "poise," "improvement of stance," "elimination of foot fatigue," "better posture," and "better foot action." In so holding, we do not believe we vary from the long established principles of reviewing orders such as we have here.

We think that the respondent Sewell by his witnesses demonstrated, simply stated, that people wearing shoes that do not fit their feet, for reasons inherent

either in the customer's foot or his shoe, do very, very frequently get a better platform to walk on with the addition of Sewell's insert. Why, we cannot say with certainty. The Commission doctors who roundly condemned the device say there is no reason that the device should relieve one's foot ills. We do not think the doctors' opinion and their few case histories of failures of the device overcome the proof of frequent successful use. There is no proof the device ever did any damage. Some doctors suggested in certain cases it could. Further, we think after cross examination of the Commission's experts very little was left of their opinions on the "lay" claims of general efficacy.

We believe that if we concede that when often the addition of the device produces a better fitting shoe that every one of Sewell's claims naturally flows, except those based on the assertion of special effect of the cuboid bone or the device being scientific. A better fitting shoe should result in better foot balance, some relief from aches and pains, better poise and balance, better poise, posture and balance, better foot health and better comfort. And even housewife's drudgery ought to be lessened.

We think perhaps there are two basic mistakes in the case and which lead us to believe that the Commission was legally wrong in part and justify our declination to enforce the order in full. First, we believe in the testimony of the experts of the Commission, they have failed to start with the premise that Sewell fitter starts with. That is, that the shoe of the customer prospect for some reason does not fit the foot or the foot does not fit the shoe. Maybe a different shoe would often give the customer balance, relief from aches and pains, give him better posture and poise and stance. But if the customer gets it by a Sewell

device, we see no objection to advertising that it does. (And in the main, we do not think the expert opinion meets the proof here of the generally satisfied customer.) The Commission experts apparently would proscribe entirely the use of the trial and error method of experimenting with devices to relieve one's foot aches and pains.[2]

Secondly, we think the examiner and the Commission have reduced generality to specificity, when it was not justified. For example, the approach to "balance" seems to have been in the sense of the physicist in the laboratory. We think there is in the vernacular lexicon a meaning for the word which imports a feeling of well being, a feeling "that it fits."

While we must accept the Commission's determination, right or wrong in the abstract, that the claims of special efficacy on the cuboid bone is false science and that it is not a scientific device, we think the other claims of Sewell are within the legitimate field of "puffing" of the ad man.

In reaching our decision, it should not be understood that we announce our own independent beliefs

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[2] One of the Commission's experts testified that the correct approach to diagnosing foot ailments is to have the sufferer disrobe in the doctor's office, because the trouble may originate above the foot up in the body or the legs. Then the doctor makes a visual inspection of the naked person. Last he looks at the feet. Such a procedure may be the most scientific approach. But we doubt if it is the only approach.

It well may be that the public would be better served if all shoes were fitted by doctors. Perhaps only doctors should prescribe any type of corrective devices, although there is a ring of verity in the testimony of one of Sewell's experts when he says that most medical men, even the bone and joint specialists, do not want to "fool" with foot troubles. But who should prescribe the devices is beyond the scope of this inquiry into Sewell's advertising practices.

about Cuboids. It is just our judgment that when the evidence was all in and when the Commission's experts were done that the objections of the complaint as to the general claims about Cuboids were left without substantial evidence, only with general statements of experts weakened too badly by the experts' own subsequent testimony. See *Tractor Training Service* v. *Federal Trade Commission,* 9 Cir., 227 F. 2d 420.

The Commission has not attacked the brand name of "Cuboid." And, of course, it would appear that the name has acquired a secondary meaning. Therefore, our mandate will not affect the continued use of the name "Cuboid," per se.

Sewell claims stoutly that he did not have a fair hearing before the examiner. We find this unnecessary to decide, although a close perusal of the record lends some support to the contention. As one tediously reads the record, a shading in the trial examiner's remarks appears here or a nuance there which gives one a feeling of predestination that the examiner's ruling will be against Sewell. (This occurs independently of the "drift" of the testimony of the witnesses.) Of course, it is difficult to avoid coming to a conclusion before the last question has been asked. Perhaps, the truth may be only that some triers of fact are more circumspect in what they say than others.

But evidence of the foregone conclusion here is found when during the interrogation of the Commission's last expert the trial examiner says, "When he [meaning Sewell] appeals—I think if he thinks enough of this [i. e., the point under discussion at the moment], that he will appeal from my ruling and when he goes before the Commission he will have the document he offered to prove by this witness. The

Commission will then decide if I am in error in denying him." The examiner's statement is not prefaced by "If I should decide the case against you." And the statement in its context can only be projected on a predetermined conclusion of the issues of the case adverse to Sewell. Else, why would Sewell have any occasion to appeal to the Commission?

If judicial perfection cannot be obtained, at least the observation of the forms of fairness often make it easier to pull out of the quicksand of error.

On this review, the Commission's order is affirmed insofar as it prohibits Sewell from advertising special efficacy on the cuboid bone and on other related bones, and insofar as he advertises the device is "scientific;" otherwise, not.

JAMES ALGER FEE, *Circuit Judge,* concurring:

In view of the fact that a dissent is to be filed, the following may add clarity to our determination.

The right of the people who buy shoes and have individual ideas in respect to comfort, poise, balance and posture is involved here. It is not a contest between a selfish seller and an administrative body. Insofar as purely scientific and medical claims are concerned, the Commission is fully supported by this Court. In such a field, where experimentation might be dangerous, perhaps the individual must be protected against himself. It is an extremely close question as to whether a situation existed which justified the elimination of such claims here. However, as to the scientific and medical phases of the findings of the Commission, although these are based upon testimony of experts, this Court has given full concurrence to

the results reached.[1] Where almost every individual in the nation passes, perhaps once, perhaps many times a year, through the hands of shoe salesmen, balance, poise, posture and comfort are, in essential, the bases of the sales. In regard to these matters, the individual exercises his own ideas. Even an expert, whether a doctor, a witness for the Commission or a shoe salesman, will be unable to tell the individual that a shoe is or is not comfortable for him or, particularly, her. The idea that each member of the public must be forced to go to a doctor before anyone can help him put anything in or on his shoes circumscribes the liberty of the individual. But this is apparently the attitude of the experts of the agency.

Even after sale, a multitude of wearers of shoes use devices of various sorts to change the balance, poise and posture of the individual or the fit of the shoe to attain comfort. Ankle supports, arch supports, metatarsal pads, rubber sponge, inner soles, corn and bunion pads are added. Shoes are stretched and heels are heightened or raised in part. Outer soles are added. Half soles are placed. Each of these operations may well affect balance, posture and poise of the individual. The wearer ordinarily uses devices for comfort and to give him relief from some real or fan-

[1] Cf. *Fulton* v. *Federal Trade Commission*, 9 Cir., 130 F. 2d 85, diabetes nostrum; *Stanley Laboratories* v. *Federal Trade Commission*, 9 Cir., 138 F. 2d 388, douche power; *Irwin* v. *Federal Trade Commission*, 8 Cir., 143 F. 2d 316, medical device called "deloxifier"; *Aronbert* v. *Federal Trade Commission*, 7 Cir., 132 F. 2d 165, menstruation remedy; *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 7 Cir., 208 F. 2d 382, modified 348 U. S. 940, drug claim of "cure" for rheumatism, arthritis proscribed, but "relief" allowed; *Fairy Foot Products Co.* v. *Federal Trade Commission*, 7 Cir., 80 F. 2d 684, bunion preparation claimed to give "permanent relief."

cied discomfort. Sometimes any one or more of these devices may be used for style. The low or high heels in women's shoes affect each of these factors. Here the Commission holds that the distributor may not even suggest in advertising that the articles which he makes for the specific purpose of affecting balance, poise and posture to advantage may accomplish it to the satisfaction of the wearer.

There was no substantial evidence in the record that cuboids cannot or do not advantageously affect balance, poise, posture and comfort of the wearer and fit of the shoe.[2] There is a great deal of testimony by wearers that some of these elements were affected. There is testimony that these are prescribed by certain physicians. The opinions of the experts, adduced by the agency, contain highly esoteric discussions of the balance of the foot and theories of various schools of scientific thought. The question before the agency was not one for expert opinion. The lay testimony alone was substantial on this issue. Besides, it is obviously true that cuboids, by their mere presence under the foot, must in some way affect balance, poise and posture, and may certainly affect the comfort of the individual, which, of course, is entirely subjective. The addition of an element not previously there can have no other effect. Thus it is not unreasonable to permit the buying public to experiment with devices possessing this characteristic in their search for foot comfort. The question is not one for the exercise of expertise or even for appraisal of expert opinion, but of common sense. As to these features, insofar as the findings were exclusively factual, the standard of

[2] *Lippincott* v. *Federal Trade Commission*, 3 Cir., 137 F. 2d 490, 491; *Carlay Co.* v. *Federal Trade Commission*, 7 Cir., 153 F. 2d 493, 496.

review would be the substantial character of evidence adduced to support the determination. However, in this case the finding that these devices do not advantageously affect balance, poise, position and posture could be held "clearly erroneous" under a much stricter standard than we are technically required to apply. Furthermore, for the purpose of review, this Court is permitted to ascertain for itself the issues presented and examine the whole record.[3]

So defined, the final order was not based wholly on a finding of fact, but also upon the proposition of law that the advertising considered in this case violated the statutory criteria and constituted "deceptive acts and practices."[4] This Court would not be required to pass upon the question of whether there was substantial evidence to support any facts upon which the Commission may have made findings. The unsubstantial character of the evidence has been pointed out to show that such findings could not be conclusive and to highlight the fact that the order is founded upon a conclusion of law. A comprehensive review of the decisions indicates that the question whether advertising is "deceptive" is treated in part as one of law. The approach may be somewhat empirical, but the courts do draw the line. In this case, the Commission far exceeded rational bounds in the mandatory order.

Another contention is that the claim of Sewell that "now everyone can enjoy better posture, poise and balance with * * * cuboids" was a universal, unqualified claim and thus patently false. But it cannot be held deceptive because it is addressed to the

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[3] *Federal Trade Commission* v. *Curtis Co.*, 260 U. S. 568, 580.

[4] Federal Trade Commission Act, as amended, § 5, 15 U. S. C. A. (1955) § 45.

taste and the subjective feelings of foot and bodily comfort. The advertising was addressed to the general public. Fine-spun interpretations and pseudo-scientific construction of the language cannot avail the agency, but it must be shown that the effect of the expressions upon the ordinary reader would be to mislead and deceive him.[5]

> "What was said was clearly justifiable, under the circumstances, under those cases recognizing that such words as 'easy', 'perfect', 'amazing', 'prime', 'wonderful', 'excellent', are regarded in law as mere puffing or dealer's talk upon which no charge of misrepresentation can be based. [Citing cases.]" *Carlay Co.* v. *Federal Trade Commission,* 7 Cir., 153 F. 2d 493, 496.

This advertising was not as a matter of law deceptive. It is true, some of it is rather warm in expression.[6] But it is no more expressive than the claims made for the colors and comfort of modern automobiles. If all such claims so expressed were deceptive, practically all modern magazines would cease business.

The courts have exercised the power to overturn decisions of the Commission which were less flagrantly in error than this.

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[5] *Folds* v. *Federal Trade Commission*, 7 Cir., 187 F. 2d 658; see also *P. Lorillard* v. *Federal Trade Commission*, 4 Cir., 186 F. 2d 52, 58, where one court affirmed finding that quotation of article out of context was deceptive.

[6] Cf. *Gulf Oil Corporation* v. *Federal Trade Commission*, 5 Cir., 150 F. 2d 106, where unqualified claims of "complete protection" afforded cattle through use of insecticide were proscribed. But, unlike the instant case, the merits of insecticide were not a matter of subjective measurement. *International Parts Corporation* v. *Federal Trade Commission*, 7 Cir., 133 F. 2d 883, claim that metal finish "prevents" rust does not connote permanency; *Kidder Oil*

POPE, *Circuit Judge:*

I dissent. It seems to me clear that the court has assumed a power which it does not have and has meddled in a decision which it is not authorized to make. In *Fed. Trade Comm'n* v. *Algoma Co.,* 291 U. S. 67, 73, the Supreme Court described what has happened here in language which could not be more apt if it had been spoken concerning this very case. Said the Supreme Court: " 'The findings of the Commission as to facts, if supported by testimony, shall be conclusive.' 15 U. S. C. Sec. 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. . . . In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.,* 273 U. S. 52, 61, 63) forbid that exercise of power." This is a clear case in which the majority of the court, stepping into the shoes of the Commission, have undertaken to say how they would decide it. The clue to their fundamental error is to be found in the last sentence of the opinion's footnote 1 where it is stated that the "real issue" is "Do the supports frequently give relief to those who complain of their feet?" I think it is demonstrable that this was not the issue before the

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Co. v. *Federal Trade Commission,* 7 Cir., 117 F. 2d 892, claims of "perfect" protection for bearings by graphite content oil; *Carlay Co.* v. *Federal Trade Commission,* 7 Cir., 153 F. 2d 493, claims that reducing plan was "easy"; *Oskimoor and Co.* v. *Federal Trade Commission,* 2 Cir., 16 F. 2d 962, exaggerated pictorial representation of mattress. *Cf. Howe* v. *Federal Trade Commission,* 9 Cir., 148 F. 2d 561, cert. den., 326 U. S. 741, cosmetics held falsely labelled "Hollywood," "Favorite of the Stars," when actually made in Seattle.

Commission and that it is even less an issue before this court.

In its improper weighing of the evidence before the Commission, the court discloses that it is much impressed with the fact that a substantial number of witnesses testified that they did very frequently get a better platform to walk on with the addition of Sewell's insert. The strong medical testimony which the Commission accepted amounted to a demonstration that if the petitioner's device helped certain individuals it was because it happened to fit their particular foot trouble, but that generally speaking people with foot trouble must be prescribed for individually because of the many varieties of such trouble and the many things which cause them. The court says: "We do not think the doctors' opinion and their few case histories of failures of the device overcome the proof of frequent successful use."

But what the court thus assumes was the issue here and what it expressly said in footnote 1 was the issue, is not the issue at all. Indeed, the order of the Commission in subdivision 1 (e) quoted in the opinion expressly allows as an exception advertisements claiming benefits "to the extent that respondents' device may in instances reduce or relieve the discomfort associated with strained or tired feet." But as disclosed by the statement of facts in the majority opinion, it is not that kind of claim which is the subject of the Commission's complaint. I refer now to the lists of advertising claims quoted in the opinion. There is no suggestion in any of these advertisements that the benefits claimed "may in instances" occur. There is no suggestion that there is, to use the majority's language, "frequent successful use". On the contrary, the assertions are to the effect that "now everyone can enjoy better posture". The promises

are universal and unqualified. Cuboids will help to balance "your" body weight;—they will help "you" enjoy increased foot health and comfort. Everyone, without qualification, is promised better posture, better balance, better health. Those claims were not true.[1] Certainly the Commission was justified by the record here in finding them to be false. In the language of the Supreme Court, the conclusions and findings of an administrative body are to be supported if they have "rational basis" and "warrant in the record", *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. By no means can the conclusions of the Commission here be said to be irrational.[2]

This is no different than the case of a Ten Cent store advertising that it had a collection of all kinds of eye glasses suitable to fit every person with impaired eyesight and for the sum of $1.00 any such person could, after trying on these glasses, find a

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[1] It is immaterial that any intelligent person would know they must be false. "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced." *Trade Comm'n* v. *Education Society*, 302 U. S. 112, 116.

[2] Here the petitioner puts out a stereotyped foot cushion which undoubtedly works fine for many people. It would be fully rational for the Commission to think that any old piece of felt would work as well. The pretensions of the advertising with respect to "balance", "poise", "posture", "position", the Board could reasonably regard as misleading to prospective purchasers. The court's assumption of superior knowledge that "often" the device makes shoes fit better and that "a better fitting shoe should result in better foot balance, some relief from aches and pains", and that "even housewife's drudgery ought to be lessened," is wholly unwarranted. I think the court is without knowledge as to what percentage of users, if any, would find their shoes better fitting. But even if the court had superior expertise in the fitting of shoes, in aches and pains, and in housewives' drudgery, making findings in this field is none of our business.

pair which would relieve him of eye strain and impaired vision. Even if hundreds of persons testified that they bought glasses that way and found them very helpful, yet a commission functioning like this one, could properly prohibit that sort of advertising, for it is rational to say that even if many found satisfaction in such glasses, it was nevertheless an unfair or deceptive practice to mislead people into thinking that anyone could safely wear such glasses and that they did not need to consult an expert.

The majority of the court appear much impressed with testimony that many people were pleased with the device. The Commission, more experienced in these matters, must have known, for it is common knowledge, that any charlatan may produce a multitude of testimonials supporting his claims. The issue here is not, as the court says, "Do the supports frequently give relief?", it is, "Whether advertising the device as a cure-all is an unfair or deceptive act or practice?" The rule laid down in the *Algoma* case, supra, has been cited and applied by the Supreme Court in such a multitude of cases[3] that I may be permitted to express some astonishment that the majority should, without the citation of a single authority to sustain its action,[4] wholly disregard this settled rule of limitation of this court's authority in cases of this kind.

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[3] "In a matter left specifically by Congress to the determination of an administrative body . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing . . . and an application of the statute in a just and reasoned manner." *Gray* v. *Powell*, 314 U. S. 402, 411.

[4] The only case cited in the opinion is *Tractor Training Service* v. *Federal Trade Commission*, 9 Cir., 227 F. 2d 420. The only resemblance that case has to the present one is that it was a Federal Trade Commission case. The court there sustained the Commission.

In *American Air Lines Inc.* v. *North American Air Lines Inc.*, 351 U. S. 79, decided at the last term, the Supreme Court was dealing with § 411 of the Civil Aeronautics Act, which, like the Federal Trade Commission Act, prohibits "unfair or deceptive commercial practices and unfair methods of competition." The court cited and applied its own rules as developed in the Federal Trade Commission decisions. Its language is precisely applicable here. It said (p. 85): "Under Sec. 411 it is the Board that speaks in the public interest. We do not sit to determine independently what is the public interest in matters of this kind, committed as they are to the judgment of the Board. We decide only whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination." With that standard for determining the function and jurisdiction of this court, this decision cannot stand.

The concurring opinion, instead of adding "clarity to our determination", seems to me to travel even more wide of the mark. From some source outside the record we are furnished information about how some people use ankle supports, arch supports, metatarsal pads, and a variety of other named inserts; how others stretch shoes, heighten heels, add soles and half soles, and that "each of these operations may well affect balance"; some "may be used for style", and high or low heels in women's shoes "affect each of these factors". (i. e., I suppose, both balance and style). Although disclaiming any such "expertise" as to permit me to affirm the assertions of my associates in this field, I do not question the existence of the named practices. Indeed, I have even heard of people wearing copper plates in their shoes to ward off arthritis.

Listing all these practices which shoe wearers may try for themselves might furnish a plausible reason why the Commission should not concern itself with as small a matter as cuboids, on the theory that if the public do not try cuboids, they will probably try something else.

But those are considerations not within our competence. The Commission has found the methods of advertising unfair and deceptive, and petitioner's claims that "every one" will be helped by this cure-for-all are false. The finding has a rational basis and warrant in the record. It is not for us "to determine independently what is in the public interest."

(Endorsed:) Opinion, Concurring Opinion, and Dissenting Opinion. Filed, Oct. 16, 1956. Paul P. O'Brien, Clerk.

APPENDIX B

Final Decree

James H. Sewell, doing business under the fictitious firm name and style of Burns Cuboid Company, petitioner herein, having filed in this Court on May 10, 1954, petition to review and set aside an order to cease and desist issued on March 12, 1954, by the Federal Trade Commission in a proceeding before the said Commission entitled, "James H. Sewell, et al., trading as Burns Cuboid Company, F. T. C. Docket No. 5850"; and the petition having been heard by this Court on briefs and oral argument; and this Court having rendered its decision on October 16, 1956, whereby it modified the Commission's order by affirming it "insofar as it prohibits Sewell from advertising special efficacy on the cuboid bone and other related bones, and insofar as he advertises the device is 'scientific;' otherwise, not;"

Now, therefore, it is hereby ordered, adjudged and decreed that petitioner, James H. Sewell, individually and trading as Burns Cuboid Company, or under any other name, his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of petitioner's device designated generally as "Cuboids," "Burns Cuboids," "Cuboid Foot Balancers," or "Doggies," or any device of substantially similar construction or composition, whether sold under the said names or any other names, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated by means of the United States mails, or by any means in commerce, as "Commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that the wearing of petitioner's device will in any way aid the Cuboid Bone or

its position or stability with respect to other bones of the feet or will serve to readjust, realign, normalize or improve the position of the bones of the feet.

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said produce in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in Paragraph 1 hereof;

And it is further, ordered, adjudged and decreed that within ninety days after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which he has complied with this decree.

Without prejudice to the right of the United States, as provided in Section 5 (1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist, as modified and hereby enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance therewith in every respect and to prevent evasion thereof.

By the Court:

Decree approved:

(S) JAMES ALGER FEE,
(S) RICHARD H. CHAMBERS,
United States Circuit Judges.

Endorsed:

Filed: December 12, 1956.

PAUL P. O'BRIEN,
Clerk.

APPENDIX C

Findings of Fact, Conclusion, and Order of the Federal Trade Commission

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 21, 1951, issued and subsequently served its complaint in this proceeding upon James H. Sewell and George Pepperdine, co-partners trading as Burns Cuboid Company, charging said respondents with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing by respondents of their answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission, theretofore designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. On December 31, 1952, the hearing examiner filed his initial decision.

Thereafter, within the time permitted by the Rules of Practice of the Commission, respondent James H. Sewell appealed from the initial decision of the hearing examiner and this matter came on for final hearing upon the complaint, answer, testimony and other evidence, briefs in support of and in opposition to such appeal and oral argument; and the Commission, having duly considered the record herein and having ruled upon said appeal and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings

as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH ONE: At the time of the issuance of the complaint herein, respondents James H. Sewell and George Pepperdine were co-partners trading as Burns Cuboid Company having their principal place of business at 414 East 4th Street, Santa Ana, California. On or about May 1951, respondent George Pepperdine disposed of his entire interest in said business to his co-partner respondent James H. Sewell and since that time has had no connection whatever with that business. Respondent James H. Sewell, being the sole owner thereof, has operated the business in the name of Burns Cuboid Company, the address of the business remaining the same.

PARAGRAPH TWO: Said respondents for several years last past have been, and respondent James H. Sewell now is, engaged in the business of manufacturing and selling a device, as "device" is defined in the Federal Trade Commission Act, generally designated as "Cuboids," "Burns Cuboids" or "Cuboid Foot Balancers" and an experimental device which is similar thereto known as "Doggies." Respondents' device is made of cork, felt and leather, containing no metal whatsoever, and has elevations along its sides beginning where the forward sides of the wearer's heel will be placed when worn. These elevations extend forward and are intended to end as an elevation across the area of the ball of the foot behind the metatarsal joints. Respondents' products are sold in pairs for insertion in shoes for the purposes of relieving foot troubles, aiding in balancing the feet and

the body, assisting the bones of the feet to regain and hold their normal positions, and to generally add comfort otherwise to the feet of the wearer. Respondents have caused said devices to be transported from their place of business in the State of California to purchasers thereof and to numerous department stores and shoe stores located in various other States of the United States, in which department stores and shoe stores respondents have representatives for the purpose of fitting the device into the shoes of customers and selling the same to the individual customers. During the times mentioned herein, respondents have maintained a course of trade in said products in commerce between and among the various States of the United States.

PARAGRAPH THREE: Respondents, since 1947, have disseminated and are now disseminating advertisements concerning their said device by the United States mails and by various other means in commerce as "commerce" is defined in the Federal Trade Commission Act for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device; and respondents have disseminated and have caused the dissemination of advertisements concerning their said device by various means for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their device in commerce as "commerce" is defined in the Federal Trade Commission Act. Included in the circulars, leaflets, pamphlets and advertisements appearing in newspapers, magazines and other periodicals of interstate circulation, which respondents have disseminated or caused to be disseminated, have been the following statements and representations:

"Cuboids help to balance your body weight . . ."

"CUBOID FOOT BALANCERS"

" . . . the foot and body balance, the relief from aches and pains CUBOIDS afford."
"Better poise and balance replace aches and pains." " . . . Enjoy more normal foot action with Cuboids."

"They're the modern way to foot relief—combining scientific principles of balance and support to lessen fatigue and help improve your stance."

"Now everyone can enjoy better posture, poise and balance with . . . Cuboids."

"Metal-Free Cuboids

"Especially designed to help you enjoy increased foot health and comfort."

"With Cuboids foot pains often disappear as if by magic."

"Cuboids foot balancers make housework less tiring."

"Cuboids help to distribute body weight . . . "

"The feet are the body's foundation, Cuboids balance this foundation and provide the basis for correct posture."

"The Cuboid bone is the keystone of the outer or weight-bearing arch and its position determines the relative position of every other bone in the foot. Cuboid metal-free foot balancers are scientifically designed to help bring these bones into normal position."

"Cuboids afford effective relief to aching and calloused feet."

PARAGRAPH FOUR: Through use of the advertisements containing the statements and representations hereinabove set forth, respondents have represented, directly and by implication, that the use of their device will assist the wearer to obtain body balance and foot balance; that it will relieve aches and pains regardless of the cause thereof; that more normal

foot action will result from the use of said device; that respondents' device will assure the user better posture, poise and balance and that it will assist in improving the stance; that housework will be rendered less tiresome by wearing Cuboids; that the use of respondents' device will afford increased foot health and comfort and beneficially assist in the distribution of body weight; that upon the correct position of the Cuboid bone depends the relative position of every other bone in the foot, and that if these bones are maladjusted as to position the use of such device will serve or assist to normalize their position; and that calloused feet will be relieved by the use of Cuboids.

Through use of the term "Foot Balancers" in the designation and description of their device, respondents additionally represent and indicate that the use of their device will assist the wearer to balance the feet or body.

PARAGRAPH FIVE: Conflicting testimony was presented and received with respect to the truth or falsity of the foregoing representations. Orthopedic surgeons well-trained in their field expressed opinions during the course of their testimony which support conclusions that such representations were false and misleading. On the other hand, the witnesses supporting the contention of the respondents that said representations were for the most part true consisted of a general practitioner who had not been in active practice for a number of years but who testified that he had given study to the question of posture of human beings; and another doctor of medicine who is also an osteopathic physician and who, in addition to conducting a practice primarily devoted to the treatment of foot conditions, has been engaged for many years as an adviser to a manufacturer of shoes

featuring a device similar to that manufactured and sold by respondents. Considered also by the Commission in reaching its decision here, in the same manner as if the physician therein referred to had appeared as a witness in this proceeding, have been the evidentiary matters set forth in respondents' "offer of proof," appearing at pages 871 to 877 of the transcript of hearings.

PARAGRAPH SIX: In attaining body balance in the foot, a person stands on what is called a tripod made up of the calcaneous (heel bone), the first metatarsal head and the fifth metatarsal head, bound together with ligaments, tendons, and muscles, all of which are used, together with nerve supplies to those muscles, to maintain equilibrium. The main arch of the foot, known as the longitudinal arch, extends fr. n the heel to the metatarsal area on the inner side of the foot and its components include the following bones: the calcaneous or heel bone, the astragalus or ankle bone, the scaphoid or navicular, the internal cuneiform and the first metatarsal. Most of the body weight thrust from the tibia bone of the leg is received and distributed through the medial group of bones just enumerated, both in a standing position and during locomotion.

The human foot is constructed to adequately bear the weight of the body without any further aid to nature. Before correct treatment can be decided upon for any person complaining of trouble with his feet, which requires realignment or adjustment of the foot bones, it is essential to obtain a complete history of the case including a thorough and expert diagnosis. Consideration must be given to the shoes being worn and sometimes X-rays must be taken. Frequently, treatment which may be beneficial for one foot may not be appropriate for the other foot of the same indi-

vidual. A layman cannot make an accurate diagnosis of the conditions causing foot disorders.

PARAGRAPH SEVEN: Testimony was introduced by respondents to the effect, among other things, that their device tends to fill in areas in the rear of the shoe where it is asserted, in many instances, a shoe does not fit or conform to the foot properly, that the device serves as a foundation for the Cuboid Bone where the weight assertedly is being balanced, and that its use acts to throw weight to the outer border of the foot and elevate the forward metatarsal area. These attributes, respondents contend, demonstrate, among other things, that the use of Cuboids aids in the distribution of weight and assists the wearer to attain foot and body balance.

Although it is true that respondents' device when inserted occupies or takes up some physical space in the shoe and that some depression of the Cuboids' rear surface may result from wear, other testimony presented in support of the allegations of the complaint indicates that the device cannot be expected to grasp or grip sufficiently on the sides of the heel of the foot to correct all rolling tendencies of the heel or significantly support the back of the heel. Probative evidence was received also to the effect that respondents' device will not be instrumental in throwing the weight to the outer border of the foot should modification in these respects be of advantage. One reason why respondents' device manifestly cannot be depended upon to have this specific effect is the circumstance that both sides of the device are raised and there is the tendency for these lateral elevations to balance one another out.

Similar considerations give reason to doubt if the frontal elevation intended to end behind the metatarsal joints necessarily in all instances of use will raise materially the frontal areas in relation to the

heel bone. Assuming that elevation is afforded, however, there would be no assurance that a corresponding depression would exist in the metatarsal area so that pressure might be relieved and an improvement in balance or weight distribution stem therefrom. Respondents' support is so constructed, moreover, that it cannot affect the ligaments, the bony structures or the neuro-muscular mechanism entering into the balance of the foot. Clear and convincing also is other testimony presented by witnesses called by counsel supporting the complaint to the effect that the elevations in Cuboids do not support or serve as a foundation for the Cuboid Bone.

Foot disorders or foot troubles generally, will not be benefitted by wearing respondents' device. The only way that foot troubles can be corrected or relieved by using respondents' device would be through the relief of pressure in the metatarsal area in the region of the ball of the foot. As stated by one witness with respect to respondents' device: "* * * if it happens to fit correctly and the particular person happened to have a foot which was adapted to this device, then the position of this metatarsal pad might happily hit the right spot * * *" It appears from the greater weight of the evidence that the instances in which Cuboids would serve beneficially to change the area of pressure would be happenstances and merely occasional or rare instances. On the other hand, the use of respondents' device might aggravate the condition for which it was being used to correct. Upon the basis of its consideration of the testimony and its consideration of the device itself, the Commission has concluded that the greater weight of the evidence demonstrates that there is no reasonable probability that those wearing respondents' shoe inserts secured through fitting and recommendation of

respondents' representatives or by other sales personnel will receive the orthopedic, corrective or therapeutic benefits which respondents' aforesaid advertising promises will be afforded to them.

PARAGRAPH EIGHT: Upon the basis of the greater weight of the evidence, the Commission has concluded that the use of Cuboids will not assist the wearer to attain body balance or foot balance, or assist beneficially in the distribution of body weight. Such use will not be generally effective in affording the user better posture or poise or an improvement in stance nor will more normal or improved foot action result therefrom. The wearing of respondents' device will not afford or increase general foot health. Although the wearing of Cuboids may in some instances aid strained, tired feet, respondents' device cannot be relied upon to give comfort to users who have foot troubles or to correct or relieve conditions caused by misfitted shoes. Respondents' device is not an effective treatment for ordinary foot aches and pains and has no therapeutic value in the treatment of aching or painful feet. Cuboids will not be generally effective in treating or relieving calloused foot conditions and the use of Cuboids cannot be relied upon to lessen the fatigue caused by housework or other physical effort.

The Cuboid Bone is a bone shaped roughly in the form of a cube and is located toward the outer side of the foot near the fifth metatarsal. It is not recognized as initiating or activating any important function of the foot and although every bone in the foot is essential, the role of the Cuboid Bone in balancing the body is minor in degree. It is not the focal point or keystone for weight-bearing either in stance or during locomotion, and in no sense do the forces of thrust concentrate upon the cuboid bone as the weight

is being taken from the foot. The wearing of Cuboids will not favorably influence the position, action or function of the Cuboid Bone, nor will such use realign, readjust or normalize or improve the position of other bones of the feet.

PARAGRAPH NINE: As previously stated, Cuboids will not assist in balancing the foot or the body or assist beneficially in the distribution of body weight nor will respondents' device be effective in improving the position of the bones of the feet. The Commission has accordingly concluded that respondents' use of the term "Foot Balancers" in the advertising for the device Cuboids has been false, misleading and deceptive and that only by excision of such term from respondents' advertising can the deception which has been engendered by its use in respondents' advertising be eliminated.

PARAGRAPH TEN: (a) The complaint in this proceeding additionally charged that respondents in their advertising have represented that their device will strengthen weak muscles and feet, will improve poor circulation and will be effective in relieving pressure from sensitive parts of the feet such as nerve centers, and alleged in such connection that these statements and representations constituted false advertisements. It appears from the record, however, that the advertising statements to which these allegations refer have been discontinued and that they have not been used by respondents since the year 1947, which time is more than three years prior to the date when this proceeding was instituted. In the circumstances, the Commission is of the view that these charges of the complaint should be dismissed without prejudice to the right of the Commission to reopen this proceeding or to take such further or other action in the future as may be warranted by the then existing circumstances.

(b) The complaint also charges that respondents have represented that the use of Cuboids will afford relief to strained, tired feet and alleges, in such connection, that respondents' device possesses no therapeutic value as an aid to strained, tired feet. The greater weight of the evidence adduced in this proceeding does not support a conclusion that respondents' device possesses no value as an aid to strained, tired feet and the Commission is, accordingly, of the view that the charges relating to this issue of the proceeding should be dismissed.

PARAGRAPH ELEVEN: The use by respondents of the statements and representations, as found in Paragraphs Three and Four hereof, has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such statements and representations are true and to induce a substantial portion of the purchasing public because of such erroneous and mistaken belief to purchase respondents' device.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered that the respondents James H. Sewell and George Pepperdine, individually and as co-partners trading as Burns Cuboid Company, or under any other name, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of respondents' device, designated gen-

erally as "Cuboids," "Burns Cuboids," "Cuboid Foot Balancers," or "Doggies," or any device of substantially similar construction or composition, whether sold under the said names or any other names, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:

(a) That the wearing of respondents' device will assist in balancing the feet or body.

(b) That respondents' device possesses therapeutic value for aching or painful feet.

(c) That the wearing of respondents' device will enable the user to achieve better posture or poise or will improve the stance.

(d) That the wearing of respondents' device will result in more normal foot action or improved foot action or foot health.

(e) That the wearing of respondents' device will afford increased comfort for the feet or decrease the fatigue resulting from housework or other physical efforts except to the extent that respondents' device may in instances reduce or relieve the discomfort associated with strained or tired feet.

(f) That the wearing of respondents' device will have beneficial effect upon the distribution of body weight.

(g) That the wearing of respondents' device will in any way aid the Cuboid Bone or its position or stability with respect to other bones of the feet or will serve to readjust, realign, normalize or improve the position of the bones of the feet.

(h) That said device possesses therapeutic value in the treatment of calloused feet.

2. Disseminating or causing to be disseminated any advertisement by any means for the

purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in Paragraph 1 hereof.

It is further ordered that respondents, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of their device, as aforesaid, do forthwith cease and desist from use of the expression "Foot Balancers" or any other term or words of similar import or meaning to designate, describe or refer to their device.

It is further ordered that the charges of the complaint referred to in subparagraph (a) of Paragraph Ten of the Commission's findings as to the facts be, and the same hereby are, dismissed without prejudice, and that the allegations of said complaint to which subparagraph (b) thereof relates be, and the same hereby are, dismissed.

It is further ordered that the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Mead not participating for the reason that he did not hear oral argument and Commissioner Gwynne not participating for the reason that oral argument herein was heard prior to his appointment to the Commission.

(Signed) Alex. Akerman, Jr.,

[SEAL] ALEX. AKERMAN, JR.,

Secretary.

Issued: March 12, 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1957

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NO. 823

In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

JAMES H. SEWELL, DOING BUSINESS AS BURNS CUBOID COMPANY, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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NO. 823

In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

JAMES H. SEWELL, DOING BUSINESS AS BURNS CUBOID COMPANY, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The Commission's Petition contains an erroneous interpretation, in its stated "question", of the Court of Appeals' Decision. There is a vast difference between weighing opposed evidence (substantiality assumed) . . . the function of the trier of fact . . . and of deciding whether or not evidence is substantial . . . the function of an appellate tribunal.

The Commission's assertion i.e. that the Court of Appeals "held that the testimony of certain 'satisfied' customers overcame the contrary testimony of expert witnesses" . . . and in so holding "substituted its judgment upon the facts for that of the Commission" (Petn. P. 2), is not borne out by any analysis of either of the majority or the concurring opinion. Omitted is the true statement that the Court of Appeals held the Commission's evidence to be without substance. The Commission seizes upon a general parenthetical remark in the opinion (Petn. App. A., P. 17) : "(And in the main, we do not think the expert

We herein use the same system of reference numbers to the record as does the petitioner, i.e., Roman numerals for the volume, Arabic for the page. The record is not printed, as a considerate Court of Appeals, by permitting typewritten record, on motion, enabled the respondent here to save some $3000.00 of printing cost.

opinion meets the proof here of the generally satisfied customer)". Whereas, this is the Court's actual holding:

"It is just our judgment that when the evidence was all in and when the Commission's experts were done that the objections of the complaint as to the general claims about Cuboids were left without substantial evidence, *** "(Petn., App. A. P. 18) and in the concurring opinion, these statements are found: 1) "There was no substantial evidence in the record that Cuboids cannot or do not advantageously affect balance, poise, posture and comfort of the wearer and the fit of the shoe" (Petn. App. A, P. 21) and 2) "The unsubstantial character of the evidence has been pointed out to show that such findings could not be conclusive ***" (Petn., App. A, P. 22).

The Commission mistakes discussion in the opinion for the actual holding.

CRITICISM OF THE COMMISSION'S STATEMENT

The Commission's statement is accurate as to dates, procedures, etc., and the nature of the product. However, the advertising claims are not fully quoted: (Petn., P's. 3-4). (Full statement of the claims at Petn., App. A, P's. 12-13).

The argumentative assertions of the Commission however, we vigorously challenge:

I

THE QUESTION IS OF SUBSTANTIALITY, NOT WEIGHT

"At the hearing, experienced orthopedic specialists or surgeons of recognized standing testified as to the falsity of the sweeping and unqualified claims made on behalf of respondent's device". (Petn., P. 4).

The experts had the qualifications set forth in the Petition's footnotes (Petn., P.'s. 4-5). Yet it is *what they said,* not *who they were,* that caused the Court to state:

"Further, we think after cross-examination of the Commission's experts, very little was left of their opinions on the 'lay' claims of general efficacy" (Petn., App. A, P. 16).

This from the majority opinion.

These experts testified on their direct examination in most general terms that in their opinion the claims were false. We do not here summarize their respective cross examinations in any detail. But one expert was so little acquainted with the actual product that he did not even know which side of it went up in the wearer's shoe. (II-40). Expertness is acquired essentially from experience, and while the witness had experience as an orthopedic doctor, he had *NO* experience with the product under scrutiny. Hence, not an expert on the *product in question.*

All the Commission's experts on cross examination admitted in one way or another the pragmatic truth of Sewell's claims. One prescribed and designed similar devices; others stated positive advantages to be obtained by using devices similar to, or embodied in, the product. Dr. Lewin, for example, had designed . . . and often prescribed, leaving the shoemaker to fill the prescription . . . a "modification for shoes" in all aspects identical to the postmetatarsal support inherent in the product (IV-937-941) He often uses other devices also thus inherent. His testimony as to their purposes and effects might well have been the basis for most of the advertising claims in controversy. (IV 937-941). While each expert for the Commission on direct examination testified in general that the 'product would not perform as claimed, yet each. on cross-examination, stated that some device in all respects similar to the product, or components thereof, would, in fact, thus perform. Moreover, these examinations pertained also to the *long discontinued* claims which the Court indicates should have been eliminated from the inquiry (Petn. App., A, P. 13, footnote) by the trial examiner.

Thus it was that the Court, as above quoted, considered the experts' testimony of no substance.

The Commission, in all, cogently fails to note that the entire majority opinion is bottomed on the absence of substantial evidence, not on the parenthetical remark so avidly seized upon . . . minus the parenthesis. (Petn., P. 6, Petn., App. A, P. 17).

II

THE COMMISSION'S TRANSPOSITION IS ERRONEOUS

The Commission's Statement" (Petn., P. 6) contains a glaringly misleading "lift" from context, and transposition of quoted segments, which presents a basically different meaning to that of the actual words of the concurring opinion to which it refers:

The Commission says: (Petn., P. 6.): "In his [Judge Fee's] view the claim that with Cuboids 'everyone can enjoy better posture, poise and balance', while 'patently false' was not 'deceptive' ***"

Judge Fee *actually* said (Petn., App. A, P. 22):

"Another contention is that the claim of Sewell is that 'now everyone can enjoy better posture, poise and balance with *** Cuboids' was a universal, unqualified claim and thus patently false."

III

THE COMMISSION BEGS THE QUESTION

The Commission's analysis of the Court's reasoning, (Petn., P. 6) is not consistent with the logic of the Court's opinion. The Commission assumes (without argument) that its evidence *was substantial.* The Court, however, postulates that this evidence *was not substantial,* and gives its reasons. The Commission asserts that the Court "weighed" the evidence in coming to its conclusion, whereas, actually, the Court says there is no substantial evidence to support the unsustained findings, and then, in the absence of substantial evidence, holds that our lay testimony *is* substantial. The house grounded on sand has blown away; that grounded on rock has stood. The burden of proof was on the Commission.

IV

THE GIST OF THE COURT'S DECISION IS THAT OPINION EVIDENCE MUST FALL AGAINST PHYSICAL FACTS

Judge Fee (Petn. App. A., P. 21-22) states what we submit is the basic rationale of both the majority and the concurring opinions:

"The question before the agency was not one for expert opinion. The lay testimony alone was substantial on this issue. Besides, it is obviously true that Cuboids, by their mere presence under the foot, must in some way affect the comfort of the individual, which, of course, is entirely subjective. The addition of an element not previously there can have no other effect. Thus it is not unreasonable to permit the buying public to experiment with devices possessing this characteristic in their search for foot comfort. The question is not one for the exercise of expertise or even for appraisal of expert opinion, but of common sense. As to these features, insofar as the findings were exclusively factual, the standard of review would be the substantial character of evidence adduced to support the determination. However, in this case the finding that these devices do not advantageously affect balance, poise, position and posture could be held "clearly erroneous" under a much stricter standard than we are technically required to apply. Furthermore, for the purpose of review, this Court is permitted to ascertain for itself the issues presented and examine the whole record.

"So defined, the final order was not based wholly on a finding of fact but also upon the proposition of law that the advertising considered in this case violated the statutory criteria and constituted 'deceptive acts and practices.' This Court would not be required to pass upon the question of whether there was substantial evidence to support any facts upon which the Commission may have made findings. The unsubstantial character of the evidence has been pointed out to show that such findings could not be conclusive and to highlight the fact that the order is founded upon a conclusion of law. A comprehensive review of the decisions indicates that

the question whether advertising is 'deceptive' is treated in part as one of law. The approach may be somewhat empirical, but the courts do draw the line."

A familiar analogy is, simply stated, found in the frequent comparisons by jurists of opinion evidence that a soda charged soft drink bottle could not possibly explode against the plain, undeniable fact that it did explode.

It becomes, as Judge Fee says, a question of law, and hence reviewable, even though the approach is "empirical."

REASONS FOR NOT GRANTING THE WRIT

I

UNSUBSTANTIAL EVIDENCE IS INSUFFICIENT

In its argument, the Commission would gloss over the plain condition imposed by the Act (15 U.S.C. Section 45) and adhered to by this Court in F.T.C. v. Algoma Lumber Co., 291 U.S. 67, 73:

"The findings of the Commission as to the facts, *if supported by evidence*, shall be conclusive." (Emphasis ours)

"While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (citing) and in determining this question 'the credulity of courts is not to be deemed commensurate with the facility and vehemence with which a witness swears. "It is a wild conceit that any court of justice is bound by mere swearing." It is swearing creditably that is to conclude the judgment." ' "

Herbert vs. Lankershim
9 Cal. 2d, 409, 472
71 Pac. 2d, 220.

In the following cases, among others, the Commission's findings have been held unsupported by substantial evidence:

Allied Paper Mills vs. F.T.C.
7 Cir., 168 F. 2d. 600
Cer. Den. 336 U.S. 918

Carlay v. F.T.C.
7 Cir., 153 F. 2d, 493

Dearborn Supply Co. v. F.T.C.
7 Cir. 146 F. 2d, 5

Phelps Dodge Rfg. Corp. v. F.T.C.
7 Cir. 146 F. 2d, 393

National Lead vs. F.T.C.
7 Cir. 227 F. 2d, 825

Prima Products, Inc. v. F.T.C.
2 Cir. 209 F. 2d, 405

Minneapolis Honeywell Reg. Co. vs. F.T.C.
7 Cir., 191 F. 2d, 786
Cer. Dismissed, 344 U.S 206

Since the Commission presents to the Supreme Court nothing but a question of the interpretation of the evidence, and asks the Supreme Court to analyze the evidence and decide such questions again, we here respectfully note that the Commission has not even first petitioned the Court of Appeals for a rehearing, or a rehearing en banc, which it could have done.

Court of Appeals, Ninth Circuit. Rule 23,
(28 U.S.C.A., P. 492)

II

THE DISSENT

(Petn., App. A, P. 24-29)

The Dissent, we submit with great respect for the able judge who wrote it, has not probed deeply enough into the evidence. It has but touched the surface, accepted the old scintilla rule, and would assert a judicial concept of blindness to reality.

It has failed to consider the question of the lack of substance of the Commission's Experts' testimony. If a witness, on direct examination, categorically says that a device will *not* do what is claimed, and then, on cross examination, says

that a patently similar device *will* do what is claimed, we earnestly urge that a Court is entitled to view this as unsubstanial testimony. The dissent has failed to recognize this, and the rule stated in:

Heard vs. United States
8 Cir. 255, Fed. 829, 832:

"The testimony given by a witness on cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to bind his adversary with the truth elicited from his own witness. (Citing)."

The dissent also does precisely what it so roundly condemns as being done in the majority opinion (Petn., App., A, P's. 25-26). It contains a statement as to some of the claims, then it poses this *finding of facts*: *"Those claims were not true,"* thus *weighing* the evidence, *trying* the cause.

It weighs the evidence also (Petn., P. 25): "The strong medical testimony which the Commission accepted amounted to a demonstration . . .". Just how said evidence was "strong" is not explained.

To illustrate, for example only, why we believe the Court found the Commission's experts' evidence to be without substance, should the Supreme Court care to examine it, we append hereto (Appendix 1) first, those claims which we are still permitted to use and second, quotations from the testimony of the Commission's Expert, Dr. Philip Lewin, on cross-examination, for ready reference and comparison.

As this court has indicated in Universal Camera Corp. vs. National Labor Relations Board,
340 U.S. 474,
the concept of judicial review of the orders of administrative bodies was rectified by the Administrative Procedure Act (5 U.S.C. Sec. 1001-1011) where the Court said:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence, or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a

theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

This is, we submit, the criterion apparent in the majority and concurring opinions:

"A better fitting shoe should result in better foot balance, some relief from aches and pains, better poise, posture and balance, better foot health and better comfort. And even a housewife's drudgery ought to be lessened" (Petn., App A, P. 16, Majority Opinion).

"Even after a sale, a multitude of wearers of shoes use devices of various sorts to change the balance, poise and posture of the individual or fit the shoe to attain comfort, ankle supports, arch supports, metatarsal pads, rubber sponge, inner soles, corn and bunion pads are added. Shoes are stretched and heels are heightened or raised in part. Outer soles are added. Half soles are placed. Each of these operations may well affect balance, posture and poise of the individual. The wearer ordinarily uses devices for comfort and to give him relief from some real or fancied discomfort."

* * *

"The question before the agency was not one for expert opinion. The lay testimony alone was substantial on this issue. Besides, it is obviously true that cuboids, *by their mere presence under the foot*, must in some way affect balance, poise, and posture, and may certainly affect the comfort of the individual, which, of course, is entirely subjective. The addition of an element not previously there can have no other effect. (Concurring Opinion, Petn., App. A, P's. 20-21). (Emphasis ours)

These, we urge, are honest statements of widely and well known, homely, familiar facts—also to be found copiously in the record and from its entire import.

Yet the Dissent argues:

"From some source outside the record we are furnished information about how some people use ankle supports, arch supports, metatarsal pads, and a variety of other named in-

serts; how others stretch shoes, heighten heels, add soles and half soles, and that 'each of these operations may well affect balance'; some 'may be used for style'; and high or low heels in women's shoes 'affect each of these factors' (i.e., I suppose both balance and style). Although disclaiming any such 'expertise' as to permit me to affirm the assertions of my associates in this field, I do not question the existence of the named practices. Indeed, I have even heard of people wearing copper plates in their shoes to ward off arthritis." (Petn. App. A, P. 28).

Presumably, the dissenter does possess such "expertise" as qualifies him to thus ridicule the wearing of a copper plate for the purpose mentioned. We respectfully urge, too, that such sarcasm (both the dissenter's and ours) cannot supplant judicial reasoning, when based on facts known to all.

The dissent also deals, partly in the above language, with the public interest. It is here conceded that what is the public interest is a question for the Commission. But its decisions must, as shown, be based upon substantial evidence, and the dissent spends its force in a collateral attack upon the majority and concurring opinions, rather than upon any showing as to *how---when the majority held otherwise*---"The finding has a rational basis and warrant in the record". (Petn. App. A, P. 29). But the public interest has been served by the excision of all therapeutic and scientific claims.

III

THE DECISION WILL CREATE NO FUTURE ENFORCEMENT PROBLEM SO LONG AS THE FEDERAL TRADE COMMISSION PRODUCES SUBSTANTIAL EVIDENCE

On this subject, we see no obstacle in the future to effective enforcement. The Commission here is confused where it says:

"On the issue of therapeutic value, conflict between such lay testimony and that of qualified medical experts is the rule rather than the exception. The holding below that the former

evidence is the more substantial, or that it alone is substantial, constitutes a precedent which is applicable to many Commission proceedings . . ." (Petn. P. 9).

The majority opinion orders:

"On this review, the Commissioner's order is affirmed insofar as it prohibits Sewell from advertising special efficacy on the cuboid bone and on other related bones, and insofar as he advertises the device is 'scientific'; otherwise not." (Petn. App. A. P. 19).

The Commission's order has been upheld *in full* "on the issue of therapeutic value", and this is left to no conjecture by the opinion:

"This Court is satisfied that the Commission must be affirmed insofar as advertised claims assert that the device has a special effect on the cuboid bone of the foot or is a 'scientific' device." (Petn. App. A, P. 15). The Commission need only produce substantial evidence.

IV

NO ACTUAL CONFLICT OF DECISIONS IS SHOWN

While the Commission contends most generally that the decision of the Court below is in conflict with decisions of this Court and of other Courts of Appeals, we submit this is not borne out by the cases cited by petitioner (not one deals with substantiality of evidence), and we do not believe the petitioner can show a case where any rule has been announcd to the effect that the Commission's evidence need not be substantial.

V

THERE SHOULD BE AN END TO LITIGATION

The complaint was filed in 1951. The respondent was willing in 1950 to stipulate with the Commission, in principle, as to everything that the Commission has now won after six years of litigation. This is *de hors* the record.

In 1949, the Hoover Task Force Report on Regulatory Commissions, *inter alia*, found that the Federal Trade Commission's "dockets were preoccupied with false and misleading

advertising cases, save for an assault upon basing point price systems".

A Commenter has remarked:

"The luxury of being sued by the Federal Trade Commission should be reserved for wealthy businessmen in the highest tax brackets. The Kefauver Small Business Committee pointed out that the average period of time required to complete a Commission case (on which a cease and desist order is issued) is five years.

"The Commission refers to the large amounts of money which businessmen spend to defend these cases as an argument for increased Commission appropriations. It does not seem to consider the burden which its expensive litigation places on small businessmen unfortunate enough to be in an industry which the Commission sues 'en masse'."

19 University of Chicago Law Review, 297, 334.

Respondent here is a small businessman who has been sued—and who has stood—alone, not as part of an industry.

When the Court looks in summary at the proceedings, the "peripatetic hearings," the transcript, briefs, report of arguments, etc., etc., etc., it can surmise the proportion of respondent's active capital which has been consumed in the defense of this administrative prosecution. To permit the Federal Trade Commission to pursue and harass him further will become, we submit, persecution, not law enforcement.

VI

NO SUFFICIENT GRAVITY APPEARS TO WARRANT THIS COURT'S REVIEW

"From its inception, certiorari jurisdiction has been treated for what it is in view of the function that it was devised to serve. It was designed to permit this Court to keep within manageable proportions ,having due regard to the conditions indispensable for the wise adjudication of those cases which must be decided here, the business that is allowed to come before us . . . the governing consideration was authority in the Court to decline to review decisions which, right or wrong,

do not present questions of sufficient gravity whatever the source of these questions, whether the common law, statutes or the Constitution, other cases of obvious gravity are more than enough to absorb the Court's time and thought."

Frankfurter, J., in
Brown vs. Allen
344 U.S., 443, 489.

Since the Federal Trade Commission has won its case as to our therapeutic and scientific claims (Petn., App. B, 30-31) surely, we submit, with all respect, there can be no occasion for the indulgence by the Supreme Court in a re-analysis of evidence.

The public interest is protected; no question of any effect on the Nation's economy is even hinted in the entire record; no question of social, political, constitutional, or other public importance is present.

With cases involving the gravest and most important questions of our time, not only to the nation, but to the whole world (a proposed bill to eliminate certain racial discriminations is at present slated for consideration by the English House of Commons) continually knocking on this Court's door, the decision "right or wrong," does not present, we submit, questions of sufficient gravity.

CONCLUSION

It is submitted that the petition should be denied.

Respectfully,
GEORGE R. MAURY,
Counsel for Respondent.

APPENDIX 1.

I. THE CLAIMS REMAINING TO US UNDER THE COURTS DECISION:

Cuboids help to balance your body weight.

CUBOID FOOT BALANCERS

The foot and body balance, the relief Cuboids afford.

Drive away foot fatigue with Cuboids.

They're the modern way to foot relief . . . support to lessen fatigue and help improve your stance.

Now everyone can enjoy better posture, poise, and balance with . . . CUBOIDS.

Especially designed to help you enjoy increased foot health and comfort.

With Cuboids foot pains often disappear as if by magic. . . . make housework less tiring.

CUBOIDS afford effective relief.

B. FROM DR. PHILIP LEWIN'S TESTIMONY:

IV—932.

Q. Doctor, in the course of your practice of orthopedic surgery do you engage in the treatment of people's feet?

A. Yes.

Q. And in the course of so doing do you utilize felt pads within their shoes?

A. Yes.

Q. What is the purpose of that?

A. Well, one purpose is to relieve them of discomfort.

Q. Surely. And sometimes you use pads made of other materials, do you not?

A. No, I think we are limited entirely to felt.

Q. I see. But other materials are used in the profession, are they not?

A. Oh, yes.

IV-934 and 936:

Q. Doctor, calling your attention to Pages 101 and following of your book which, of course, you must see, do you therein describe a number of modifications of shoes which are used by you in the practice of your profession?

A. What is the question? Here they are illustrated here. What is the question?

Q. I will frame several questions:
Will you describe what a Thomas heel is?

A. A Thomas heel is one where the inner border is longer than the outer border, and the inner border is higher than the outer border.

Q. And how is that affixed to the shoes?

A. Glued on and nailed in.

Q. It is glued on, but where is it applied?

A. To the heel.

Q. Inside the shoe or outside?

A. Outside the shoe.

Q. What effect does that have?

A. It tips the weight to the outer border of the foot.

Q. By elevating the inner border?

A. That is right. This. (indicating)

Q. Now, what is a Dutchman?

A. A Dutchman is a name, I don't know where it got the name of Dutchman, but it is synonymous with the word "Cookie", which some use. It is usually a piece of material that is beveled, so that it is higher in one area than in another, and so far as I know it is a term used by shoe men, cobblers, and I guess they taught it to the shoe fitters, so that it is in common parlance now, that you can go into any cobbler and get a Dutchman put in the inner border of your shoe on the outer border of your shoe to shift your balance.

Q. What does it do? How does it shift that balance, Doctor?

A. Well, if you put one under the outer border of your foot it will shift to the medial border; if you put one under the inner border of the heel or sole it will shift to the outer border.

Q. It elevates one side?

A. It elevates one side, and then it is skived off so it gradually grades down to zero.

Q. When you elevate one side it shifts weight to the other doesn't it? That is elemental?

A. To some other side, because it can be beveled anteriorally and posteriorally towards the toes or towards the heel.

Q. What is a metatarsal bar, Doctor?

A. A metatarsal bar is an object that is placed on the sole of the shoe, or between the layers of the sole of the shoe, just back of the metatarsal heads.

Q. Yes, sir.

A. It is usually made of leather; it may be made of rubber or a composition.

Q. What is the Lewin rubber metatarsal crescent, Doctor?

A. Well, in World War II, at Camp Taylor, Kentucky, the thought occurred to me that in the Jones bar we were using a straight object to support a curved structure---

Q. Yes.

A. (Continuing)---and therefore the idea struck me that that should be a curved object, that one should use a curved object to correct a curved structure or to support a curved structure.

Q. Yes. Doctor, you have illustrated these various types of devices on Page 103 of your book, have you not?

A. Yes. There is the Jones bar, and there is the Lewin metatarsal crescent.

IV-937-41:

Q. Calling your attention to this page, the diagrams demonstrate types of bars and pads?

A. No, modification of shoes.

Q. Modification of shoes?

A. Yes.

Q. What is the general purpose of these modifications of shoes?

A. To relieve people of weight bearing on certain areas, to give them some degree of comfort, and to balance their feet more properly.

Q. You have found throughout your experience that these devices are effective in that respect?

A. Yes, sir.

Q. Calling your attention to Commission's Exhibit 3 in evidence, and to the forward section thereof, can you tell us whether there is any similarity between that and the Lewin rubber metatarsal crescent illustrated in your book on page 103?

A. Whether there is any similarity?

Q. Yes, sir.

A. Between what?

Q. Between the Lewin rubber metatarsal crescent and the device now before you.

A. This goes on the bottom of a shoe.

Q. It goes on the bottom of a shoe?

A. Yes.

Q. But it does have the effect of raising that area slightly, does it not?

A. That is right.

Q. And what would be the effect of—

A. Wait a minute. You said it has the effect of raising it?

Q. Raising that area of the foot.

A. Oh, it isn't for that purpose.

Q. What is the purpose of that?

A. The purpose is to transmit the weight from the heel to an area back of the metatarsal heads and relieve those heads of pressure.

Q. I see. And it does that by elevating the area back of the metatarsals, does it not?

A. I don't know that it elevates it. It is a weight-bearing point, so that the person transmits his weight from the heel to an area just back of the metatarsal heads, instead of having the weight come down on the metatarsal heads.

Q. I see.

A. It is sometimes called an anterior heel, that the ordinary heel that the shoe comes with is the posterior heel, and this is an anterior heel over which the foot rocks, but so far as pushing up on anything, I don't know that that occurs. I tried to do it, but when it is attached to the shoe it is just another weight-bearing point.

Q. But it does transfer weight?

A. From the heel to the forefoot.

Q. Does it transfer any weight from the metatarsal heads to the points back of them?

A. No, it is to relieve pressure or weight on the metatarsal heads.

Q. Then it takes weight off the metatarsal heads?

A. That is right.

Q. What effect would that have on callouses of the metatarsal arch area?

A. It might help, it should help them.

Q. Have you used them for that purpose, Doctor?

A. Yes.

Q. That is a very frequent prescription, is it not?

A. Yes.

Q. You do prescribe these things for various persons?

A. Individually.

Q. Individually?

A. Always.

Q. But you send them to the shoemaker to have them executed, do you not?

A. That is right.

Q. Is the same true of the other devices which you depict on that page, Doctor, that you prescribe them for various patients?

A. I prescribe some of them. That was an illustration of the principal ones.

Q. Yes.

A. I don't know that any one person uses all of those.

Q. Surely. But they may be used in combination, too, may they not?

A. Yes.

Q. Depending on the person's foot?

A. That is right.

Q. And the object is to give the person relief from foot pains?

A. That is one of the purposes, to give them relief from discomfort.

Q. And to aid them in balance, is it not, Doctor?

A. Yes.

Q. And to perhaps improve his stance?

A. Yes.

Q. Also to take weight-bearing off of sensitive parts of the feet?

A. Yes.

Q. And to transfer it to other parts of the feet?

A. Yes, sir.

IV-944.

Q. Reading from Page 101:

"The chief modifications of shoes include variations of the heels, soles, counters, and the big toe region. The chief modification of the heel is one which is longer and higher on the inner than the outer border and compels the wearer to walk over the proper walking angle, so that a weight-bearing line dropped from the middle of the patella bisects the tibia and the astragalus.

"A reversed Thomas heel is one with the outer border longer and higher than the inner. Its special indications are conditions in which it is desired to transfer the weight from the outer to the inner border, such as traumatic affections of the outer border of the foot---"

IV-945 to 946.

"The chief modifications of the sole is elevation of the outer border by means of a wedge, the highest point of which is under the base of the fifth toe.

"Modifications of the metatarsal area include a bar, cleat, or crescent made of leather or rubber which is secured to the bottom or between the layers of the sole, at a point just behind the heads of the metatarsal bones.

"A device called the "kee foot" is a thick rubber strip which is nailed to the medial border of the shank of a flexible shank shoe so that it does not quite abut against the heel and extends forward to a point back of the head of the second metatarsal bone.

IV-947.

"A 'dutchman' is a beveled piece of leather between layers of heel or sole.

"The internal modifications of shoes include inserts, steel bars, rigid uppers, the removal of toe caps, the removal of counters, patch pockets, 'cookies' and pressure pads.

IV.-947 to 948.

"Felt Pads: The functions of pads are to support and to relieve pressure. I use them under the longitudinal and metatarsal arches and for bunions, hallux valgus, and bunionettes. I pad the tongues of the shoes, the heels, and the point where the vamp breaks in walking.

"Felt may be obtained in sheets. It is cut to the proper shape or is stamped out in special shapes by means of dies. It is then beveled with a large seven or ten-inch blade so that there are no high ridges. The beveling must be done carefully so that there will be no irregumust be done carefully so that there will be no irregulaities. Ordinary rubber cement is applied to the felt and the shoe with a large brush. When both films are

absolutely dry, adhesion will be perfect.

"Additional pieces of felt can be applied later. The chief objection to felt is that it packs down. This is actually a virtue because, on account of its resiliency, it acts as a flexible support and is more comfortable than rigid material. Usually a pair of shoes requires only one series of pads, but some shoes requires two. The pad can be altered in shape, size, thickness, and position with relation to the foot and shoe at a moment's notice. The only just objections to it are its non-transferability and its compression.

IV-948.

"Indications for internal modifications of shoes are mainly determined by the necessity for supporting the longitudinal or transverse arch and providing relief from painful weight-bearing areas.

IV-950.

"The most common modifications of shoes are:

(1) elevation of the inner border of the heel; (2) elevation of the inner border of a flared heel; (3) the H. O. Thomas heel-prolongation forward and elevation of the inner border; (4) elevation of the outer border of the sole; (5) the Thomas heel plus elevation of the outer border of the sole; (6) the metatarsal cleat; (7) the metatarsal crescent; (8) the reversed Thomas heel; (9) the modified heel and the metatarsal comma bar; and the notched tilted rubber metatarsal crescent."

Q. Doctor, that was published by you in 1947.

A. Yes.

Q. Have you any additions to make to it, or do you still consider it sound descriptive matter of the things therein contained?

A. I do.

No. 823. FEDERAL TRADE COMMISSION *v.* SEWELL, DOING BUSINESS AS BURNS CUBOID CO. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. The case is remanded with directions to affirm and enforce the order of the Federal Trade Commission. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 113–117; *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67, 73. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Earl W. Kintner* and *Robert B. Dawkins* for petitioner. *George R. Maury* for respondent. Reported below: 240 F. 2d 228.